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J.C., Appellant)	
)	
and)	Docket No. 21-1216
)	Issued: April 19, 2022
DEPARTMENT OF THE AIR FORCE, 309TH)	
MAINTENANCE SUPPORT SQUADRON,)	
HILLS AIR FORCE BASE, UT, Employer)	
)	

Daniel M. Goodkin, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 10, 2021 appellant, through counsel, filed a timely appeal from a February 24, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the February 24, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant met his burden of proof to establish total disability from work for the period commencing December 31, 2012 and continuing, or from May 26, 2016 and continuing, causally related to his accepted employment-related conditions.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 25, 2014 appellant, then a 59-year-old retired nondestructive tester supervisor, filed an occupational disease claim (Form CA-2) for a back injury, which he attributed to factors of his federal employment including handling heavy equipment. He noted that he first became aware of his claimed condition and realized its relation to his federal employment on July 18, 2012.⁵ On December 29, 2014 OWCP accepted appellant's claim for lumbar spinal stenosis (L4-5 and L5-S1) and permanent aggravation of lumbar degenerative disc disease (L4-5 and L5-S1).⁶

On May 5, 2016 OWCP referred appellant to Dr. Leslie J. Harris, a Board-certified orthopedic surgeon. In a second opinion report dated May 26, 2016, Dr. Harris diagnosed employment-related bilateral carpal tunnel syndrome and determined that appellant was limited in grasping activities with both hands, as well as fine manipulation. In an accompanying work capacity evaluation (Form OWCP-5c), Dr. Harris indicated that appellant had permanent work restrictions due to his lumbar and bilateral carpal tunnel conditions. Appellant was limited to working four hours per day with restrictions.

On June 6, 2016 OWCP expanded the acceptance of appellant's claim to include bilateral carpal tunnel syndrome.

On August 8, 2016 appellant filed a claim for compensation (Form CA-7) for disability from work for the period May 26 to July 18, 2016.

OWCP subsequently received June 10, 2016 correspondence from appellant indicating that he had forwarded a copy of Dr. Harris' report to the employing establishment and inquired as to

⁴ Docket No. 18-0318 (issued December 17, 2019).

⁵ Appellant voluntarily retired from the employing establishment effective December 31, 2012.

⁶ OWCP assigned the present occupational disease claim File No. xxxxxx797. Under File No. xxxxxx334, OWCP had previously accepted that appellant injured his lower back in an August 10, 1987 work-related slip and fall. Appellant's accepted conditions included lumbar sprain and L5-S1 disc herniation. On August 22, 1991 he sustained another work-related back injury, which OWCP accepted for an aggravation of lumbosacral sprain under File No. xxxxxx534. OWCP has administratively combined File Nos. xxxxxx797, xxxxxx334, and xxxxxx534, with File No. xxxxxx334 designated as the master file. By decision dated December 21, 2015, OWCP denied an additional schedule award for the bilateral lower extremities.

whether his former employer could accommodate the restrictions, as appellant was “seeking reemployment.”

In an August 2, 2016 report, Dr. Neil B. Callister, a Board-certified orthopedic hand surgeon, noted appellant’s chronic pain and paresthesias clinically consistent with carpal tunnel syndrome with an indeterminate neurodiagnostic study suggestive of right brachial plexus lesion.

On August 15, 2016 the employing establishment controverted appellant’s claim for wage-loss compensation, noting that he had voluntarily retired from the employing establishment in December 2012, and his retirement was unrelated to his employment injury.

In a letter dated August 25, 2016, OWCP advised appellant that since he had retired effective December 31, 2012 and was no longer employed with the employing establishment, he was not entitled to wage-loss compensation for the period May 26 to July 18, 2016. It noted that no further action would be taken on the claim.

Counsel submitted an August 29, 2016 letter contending that, if an employee’s condition related to his employment injury prevented him from performing the job he held when injured, it was improper under FECA for OWCP to find that he was not entitled to compensation for disability because he had voluntarily retired.

In a September 13, 2016 report, Dr. Callister diagnosed severe left carpometacarpal (CMC) osteoarthritis, moderate right CMC osteoarthritis, and bilateral carpal tunnel syndrome.

OWCP also received October 25, 2016 treatment records regarding appellant’s lumbar condition, which were signed by a physician assistant.

By letter dated November 15, 2016, OWCP responded to counsel’s August 29, 2016 letter, advising that there was no evidence that appellant was unable to perform in his position at the time he retired on December 31, 2012. It further explained that since appellant was no longer employed with the employing establishment, he was not experiencing compensable wage loss.

In a December 29, 2016 letter, appellant requested that OWCP process his claim for compensation for the period beginning May 26, 2016, noting that he preferred to receive wage-loss compensation rather than retirement benefits. He also requested that OWCP forward an election of benefits form.

In a March 7, 2017 development letter, OWCP noted that appellant had undergone additional surgery in November 2012, and that follow-up reports through February 2013 indicated that his lumbar condition had improved 80 percent, such that he was able to sit pain free. It requested that he provide medical evidence from the date of his retirement to support that he was totally disabled from his duties and unable to work without restrictions. OWCP afforded him 30 days to submit the requested medical evidence.

In response, OWCP received various diagnostic studies. An x-ray of the lumbar spine dated October 25, 2016 showed severe disc degeneration at L4-S1, disc osteophyte complexes at L3-S1, and arthrosis to the facet joints as well with narrowing of the neural foramen, most significant at L4-S1. An October 25, 2016 right hip x-ray revealed moderate arthrosis of the right hip joint with osteophytosis involving the superior lip of the acetabulum and a loss of normal intra-

articular joint space. A March 6, 2017 lumbar magnetic resonance imaging (MRI) scan demonstrated progressive mass effect on the thecal sac at L3-4 secondary to multiple factors, significant neural foramen stenosis at L3-S1, and postsurgical changes at L4-5.

By decision dated June 8, 2017, OWCP denied appellant's claim for wage-loss compensation for disability for the period commencing May 26, 2016.

On June 26, 2017 appellant, through counsel, requested reconsideration and argued that OWCP's own second opinion physician, Dr. Harris, opined in a May 26, 2016 report that appellant could not perform his usual job due to his work-related injuries. He also noted that appellant requested light-duty work in June 2016, but neither the employing establishment nor OWCP had responded to the request.

By decision dated September 22, 2017, OWCP denied appellant's request for reconsideration. It noted that he resigned from his position on December 31, 2012 and was, therefore, not entitled to wage-loss compensation.

On November 30, 2017 counsel filed an appeal with the Board. By decision dated December 17, 2019,⁷ the Board set aside the June 8 and September 22, 2017 decisions finding that Dr. Harris failed to provide a rationalized opinion addressing whether appellant was disabled from performing his December 2012 position during the period claimed as he relied on an incomplete statement of accepted facts (SOAF). The Board noted that, if an employment-related condition prevented the employee from performing the job he held when injured, it was improper for OWCP to find that he was not entitled to compensation for disability because he had voluntarily retired. The Board instructed OWCP on remand to update the SOAF to include all the accepted conditions and appellant's full-work history following his 2012 retirement.

On January 24, 2020 OWCP referred an updated statement of accepted facts (SOAF), and list of questions to Dr. Harris for a supplemental report. In a report dated February 26, 2020, Dr. Harris diagnosed recurrence L4-5 herniation, permanent aggravation L4-5 and L5-1 degenerative disc disease with L4-5 and L5-S1 spinal stenosis. He opined that appellant was capable of performing his nondestructive tester supervisor position on December 31, 2012. Dr. Harris further found that there was no evidence that appellant was disabled from work after December 31, 2012 due to his accepted employment injuries.

By decision dated March 17, 2020, OWCP denied modification finding the evidence insufficient to establish total disability "from May 26, 2016 and continuing, and from December 31, 2012 and continuing," causally related to the accepted July 18, 2012 employment injury.

On May 26, 2020 counsel requested reconsideration asserting that Dr. Harris failed to address any disability due to the accepted carpal tunnel condition nor did he address whether appellant was disabled from working during the period May 26, 2016 and continuing due to the accepted employment conditions.

By decision dated August 20, 2020, OWCP denied modification.

⁷ *Supra* note 4.

In a letter dated August 20, 2020, OWCP requested that the employing establishment address whether work was available for appellant within his restrictions.

On September 7, 2020 counsel requested reconsideration and provided a statement from appellant regarding employment following his retirement in 2012. Appellant related that following his retirement in 2012 he sporadically worked a maximum of four hours per day as an adjunct instructor. He was unable to work in August, September, and October 2014 due to his back condition. Appellant further related that he did work sporadically through 2015 and 2016, except for periods of time in 2016 when his back spasms increased. In 2017, he worked occasionally, but cut back on work due to issues associated with his medications.

On December 7, 2020 OWCP requested that Dr. Harris provide a supplemental report. It requested that he review an updated SOAF and clarify whether appellant was disabled from performing his December 2012 job from May 26 to July 18, 2016 and continuing. Dr. Harris, in a January 25, 2021 supplemental report, noted that OWCP had accepted the conditions of bilateral carpal tunnel syndrome, permanent aggravation of L4-5 and L5-S1 degenerative disc disease, and L4-5 and L5-S1 lumbar stenosis. He noted that bilateral carpal tunnel syndrome physical findings were demonstrated in a May 26, 2016 physical examination, although an electromyograph (EMG)/nerve conduction test performed on June 25, 2015 showed no evidence of left or right median neuropathy. Dr. Harris opined that appellant, at that time, was limited in using his hands in grasping activities and fine manipulation. Thus, he concluded that appellant was disabled from performing the job of tester supervisor as of May 26, 2016 due to his bilateral carpal tunnel syndrome. Dr. Harris explained that the change in his opinion regarding appellant's disability occurred because he previously only considered whether appellant was capable of performing his position as a nondestructive tester supervisor based on his low back condition and had not considered whether appellant had any disability due to his bilateral carpal tunnel condition. He indicated that appellant would have had persistent bilateral carpal tunnel syndrome if he had continued in his job, which required manipulation of small instruments for long periods of time. Dr. Harris explained that appellant's decision to retire instead of having surgical releases appeared to be a reasonable decision. Based on his review of the record and the May 26, 2016 report, he found that appellant's carpal tunnel syndrome symptoms might have improved in the absence of his work activities, but the symptoms would most likely have returned if appellant worked during this period. Dr. Harris concluded that appellant was totally disabled for the period May 26 through July 18, 2016 from his usual work due to his bilateral carpal tunnel syndrome. In an attached Form OWCP-5c, he opined that appellant was capable of performing sedentary work with limited grasping and fine manipulation. Dr. Harris provided work restrictions of up to one hour of twisting, bending/stooping, squatting, kneeling, and repetitive wrists; elbow movements and up to one hour of pushing, pulling, and lifting 10 pounds; and no climbing.

By decision dated February 24, 2021, OWCP denied modification finding the medical evidence insufficient to establish total disability for the period May 26 to July 18, 2016, or from December 31, 2012 and continuing. It noted that at the time of his retirement appellant was working full time and there was no evidence that his restrictions were not accommodated by the employing establishment.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁸ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁹ Under FECA, the term “disability” means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.¹⁰

Whether a particular injury causes an employee to be disabled from work and the duration of that disability are medical issues, which must be proven by a preponderance of the reliable, probative, and substantial medical evidence.¹¹

ANALYSIS

The Board finds that this case is not in posture for a decision.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP’s September 22, 2017 decision because the Board considered that evidence in its December 17, 2019 decision. In the December 17, 2019 decision, the Board found that the case was not in posture for decision because the SOAF provided to Dr. Harris was drafted prior to the acceptance of the claim for bilateral carpal tunnel syndrome. The Board instructed OWCP on remand to update the SOAF to include all the accepted conditions as well list appellant’s full employment history following his 2012 retirement. Once the SOAF was updated, the Board instructed OWCP to provide the updated SOAF and relevant position descriptions to Dr. Harris for clarification regarding whether the accepted conditions disabled appellant from performing his December 2012 employment position during the claimed period. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.¹² The Board, therefore, need not review the evidence addressed on prior appeal.

Following the Board’s December 17, 2019 decision, OWCP undertook further development of the claim by requesting supplemental reports from Dr. Harris based on an updated SOAF. In a January 25, 2021 supplemental report, Dr. Harris opined that appellant was totally disabled from his usual work during the period May 26 to July 18, 2016. He advised that if appellant had not retired in December 2012 and continued working as a nondestructive tester supervisor that he would have had persistent bilateral carpal tunnel syndrome. Moreover, Dr. Harris explained that appellant’s carpal tunnel syndrome symptoms might have improved in

⁸ *Supra* note 2.

⁹ See *I.T.*, Docket No. 20-0001 (issued July 1, 2021); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *Id.*

¹¹ *I.T.*, *id.*; *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹² *F.H.*, Docket No. 21-0579 (issued December 9, 2021); *D.A.*, Docket No. 19-1965 (issued February 10, 2021); *G.B.*, Docket No. 19-1448 (issued August 21, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

the absence of his work activities, but his symptoms would most likely have returned if appellant worked during this period.

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.¹³ Once it undertakes development of the record, OWCP must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁴

Dr. Harris provided an opinion which was generally supportive of appellant's claim for wage-loss compensation. However, he did not address specific dates of disability, and he did not address appellant's work history following his December 31, 2012 retirement. Further, the Board notes that while OWCP denied appellant's claim for disability as of December 31, 2012 and continuing, as well as from May 26, 2016, OWCP did not request that Dr. Harris address the entire period of disability, which commenced on December 31, 2012. This case must, therefore, be remanded for another supplemental opinion by Dr. Harris to determine whether appellant's disability from work commencing December 31, 2012 and continuing was causally related to his accepted employment conditions. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case not in posture for a decision.

¹³ See *C.L.*, Docket No. 20-1631 (issued December 8, 2021); *J.C.*, Docket No. 20-0064 (issued September 4, 2020); *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁴ *Id.*; see also *S.A.*, Docket No. 18-1024 (issued March 12, 2020).

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 19, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board